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IN THE

Supreme Court of the United States

1958 TERM

No. 677

JAMES GEORGE REAVES, Petitioner

vs.

STATE OF ARKANSAS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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JAMES GEORGE REAVES, ... Petitioner

vs.

STATE OF ARKANSAS, ... Respondent

_____

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

_____

Petitioner, James George Reaves, prays that a writ of certiorari issue to review the decision of the Supreme Court of Arkansas, of October 6, 1958, and the denial of a rehearing thereon on November 10, 1958, which decision affirmed the judgment of the Circuit Court of Poinsett County, Arkansas, entered March 4, 1958.

OPINION BELOW

The opinion of the Supreme Court of Arkansas sought to be reviewed herein is officially reported in Arkansas Law Reporter, October 6, 1958, and the opinion is reprinted in the Appendix to this petition.

JURISDICTION

The final judgment of the Circuit Court of Poinsett County, Arkansas, was entered March 4, 1958 (R. 167-169). That judgment was affirmed by the Supreme Court of Arkansas on October 6, 1958. (R. 2 and 8). On October 20, 1958, Petitioner filed Petition and Brief for Re-Hearing before the Supreme Court of Arkansas. (R. 9-10), and on November 10, 1958, the Petition for Re-Hearing was denied. (R. 11). The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1257 (3).

QUESTIONS PRESENTED

1. Is a judgment, imposed by the Circuit Court of Poinsett County, Arkansas, who clearly showed bias and prejudice against the Defendant, a denial of a trial by a fair and "impartial" jury?

2. Is a sentence, under the circumstances shown, which amounts to a total of thirty-nine years in the penitentiary, cruel and unusual in the absence of aggravating circumstances, when the maximum fixed by Statute is twenty-one years?

CONSTITUTIONAL PROVISIONS

Amendment 8 to the Constitution of the United States and Article 2, Section 9 of the Constitution of the State of Arkansas, both provide:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Amendment 6 to the Constitution of the United States and Article 2, Section 10 of the Constitution of Arkansas, both provide:

> "In criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *."

Explanation: In Petitioner's Petition for Re-Hearing before the Supreme Court of Arkansas, he inadvertently referred to Amendment 6 of the United States Constitution as Amendment 7, to the Constitution of the United States, but this error was corrected in his brief filed on his Re-Hearing Petition.

STATUTES INVOLVED

Section 41-3907, 1957 Supplement, Arkansas Statutes, provides:

> "Whoever shall be guilty of larceny when the value of the property stolen exceeds Thirty Five ($35.00) Dollars, upon conviction thereof,

shall be punished by imprisonment in the penitentiary not less than one (1) nor more than twenty-one (21) years. * * *"

Section 41-1003, 1957 Supplement, Arkansas Statutes, provides:

"Whoever shall be convicted of burglary shall be imprisoned in the penitentiary for a period of not less than two (2) nor more than twenty-one (21) years."

Section 43-2328, Supplement, Arkansas Statutes, is Arkansas' habitual criminal act, and provides in part, for the purpose of this Petition, as follows:

"If the third offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for a determinate term not less than (2) years more than the minimum sentence provided by law for a first conviction."

STATEMENT

On the morning of April 22, 1958, the Ben Powell Chevrolet Company, on Highway 63 South of Trumann, Arkansas was burglarized. Mr. Sherman Coppel, a tenant in the building, heard a noise about 4 o'clock that morning and investigated. He saw three men come out of the Chevrolet Company building; saw one man place some object in a car and the men all got in and drove off. Mr. Coppel managed to get their car license number and called

the officers at Trumann, Arkansas. An alarm was sent out and the night Chief of Polite at Osceola, Arkansas started in pursuit of the car described, after calling other officers for assistance.

The car was overtaken by the officers and three men were apprehended — the Petitioner, James George Reaves, Lonnie Neal and a man named Garner. All of the stolen items (listed hereafter) were found in the car and recovered by the officers.

On April 24, 1957, Petitioner was brought before Hal Stricklin, a Justice of the Peace in Poinsett County, Arkansas, on the charges of burglary and grand larceny. He entered a plea of Not Guilty; was bound over to the Circuit Court and his Bond fixed by the Justice of the Peace at $20,000.00. (R. 10).

On April 25, 1957, the Prosecuting Attorney of Poinsett County, Arkansas filed Information against James George Reaves, the only defendant concerned in this Petition, charging him with committing the crime of burglary and grand larceny by unlawfully, burglariously and feloniously, and with force, breaking and entering the building of Ben F. Powell in the City of Trumann, Arkansas and then and there did unlawfully and feloniously take, steal and carry away one 35 h. p. Evinrude Outboard Motor with a six-gallon portable tank, of the value of $750.00; one Remington-Rand Adding Machine of the value of $50.00; $913.20 in Money Orders and Checks and $80.00 in lawful money of the United States of America, all of the value in excess of $35.00, the personal property of Ben F. Powell. (R. 4-5).

On May 9, 1957, the Honorable Charles W. Light, one of the Circuit Judges of the Second Judicial Circuit, including Poinsett County, Arkansas, fixed the Petitioner's Bail Bond at the sum of $12,500.00. (R. 16).

On August 27, 1957, an amended Information was filed by the Prosecuting Attorney against James George Reaves charging that said defendant had previously, on the 26th day of October, 1949, been convicted of a felony in the Circuit Court of Carroll County, Mississippi, and had previously, on the 1st day of June, 1957, been convicted in the United States District Court, Western District of Tennessee, of a felony. (R. 21-22).

When the October Term of Circuit Court convened in Poinsett County, Petitioner, having undergone an appendectomy, was confined in the Texarkana Hospital in Texarkana, Arkansas and was unable to be in Court, and for that reason filed his Motion for a continuance. (R. 23).

On the 3rd day of March, 1958, the Prosecuting Attorney presented a Motion before Honorable H. G. Partlow, Judge, who presided at Petitioner's trial, asking that the Defendant, James George Reaves, be taken into custody on the grounds that his bail was insufficient; he did not appear for trial at the October 1957 term of Court, and that his condition was not a chronic condition and the operation was unnecessary and was done for the purpose of avoiding trial, and that the Defendant had made statements to the effect that he would unlawfully attempt to influence or cause to be influenced certain members of the jury panel in order to obtain a hung jury, or mistrial, upon the trial of said cause. (R. 29).

Petitioner, on the same day, March 3, 1958, filed his Motion for the Judge to disqualify himself, and in said Motion alleged that he had executed an acceptable Bail Bond; was present in Court on March 3, 1958, subject to the jurisdiction of the Court and at all times ready for trial. No notice that he was to be taken into custody was given him and no evidence taken and he was committed to jail before his case was called for trial.

The Petition further alleged that the actions of the Trial Judge were brought about by rumors which had come to his attention and which had no basis of fact; that the Judge would be unable to lay aside all prejudice, conduct a fair and impartial trial, and said Judge should disqualify himself. (R. 27).

At the conclusion of the hearing on the State's Motion to remand Petitioner to custody, and the Petitioner's Motion to disqualify the Trial Judge for bias and prejudice, the Court remanded Petitioner into custody; raised his Bail Bond from $12,500.00 to $20,000.00, and denied his Motion to disqualify the Trial Judge, and in so doing, made the following pertinent remark:

> "* * *. The Court was informed by the Sheriff of this County the substance of the testimony just given by the witness Whelen Spears. This information was given in the presence of the Prosecuting Attorney and his deputy. * * *. The Court, whereupon, in the light of the information given

> the Court by the Sheriff of the County, based upon the testimony of the witness, Whelen Spears, ordered the Defendant into custody. * * *. (R. 53).

Neither the Defendant nor his attorney was present when this information was given by the Sheriff, as to what the witness, Whelen Spears, had told him (the Sheriff), to the Court. (R. 53).

The trial of this cause was had on March 4, 1958, before a jury, and the following verdict was returned:

> "We, the Jury, find the Defendant, James George Reaves, guilty of the crime of burglary and grand larceny, and leave his punishment to be fixed by the Court. (R. 30)."

The Court, then, in pronouncing sentence on the Petitioner, James George Reaves, made the following remarks:

> "Let the record show that in the imposition of the punishment about to be imposed the Court has been furnished with criminal records of these defendants. On the charge of burglary, the punishment for you, and each of you is fixed at ten years in the Arkansas State Penitentiary. You, James George Reaves, punishment for larceny is fixed at ten years in the Arkansas State Penitentiary. Said sentence to begin at the expiration of the sentence in the burglary conviction. After you have completed your sentence in the burglary conviction, then you will have to serve one-third

of the grand larceny conviction, before you will be eligible for parole. On the larceny charge, you will be entitled to one month off the first year for good behaviour, two months the second year, and three months each succeeding year.

* * * * * *

"The Court is taking into consideration the fact, in imposing these punishments, that you men are not just ordinary criminals like some individuals who just happened to be caught in the web of circumstances, but that you are professionals and members of a gang, an organized gang. If any other members of your gang want to operate in the State of Arkansas, they can do so at their peril. The fact that you came into Poinsett County, Arkansas and thought you could buy your way out, you made statements to the State Policemen that you made, is one reason the Court is imposing as severe sentence as he did." (R. 167-168).

ARGUMENT

I.

The bias and prejudice of the Poinsett County Circuit Judge, Honorable H. G. Partlow, began to reveal itself before the commencement of Petitioner's trial.

When Petitioner presented himself in Court on March 3, 1958, the next term after the October 1957 Term for the purpose of trial, he was immediately taken into custody by the Sheriff on orders from the Court. (R. 43).

On the same day, March 3, 1958, the Prosecuting Attorney filed his Motion to take the Petitioner into custody.

This was done in spite of the fact that:

1. Petitioner's bail of $12,500.00 had been fixed by Honorable Charles W. Light, a Circuit Judge of the same Judicial Circuit as the Trial Judge, and of equal dignity, and Petitioner was in Court ready for trial on March 3, 1958 when he was taken into custody. He had made no attempt to jump bail or to avoid trial. He appeared with counsel and stated he was there for trial. (R. 35-36).

2. Petitioner was in the hospital at Texarkana, Arkansas when Court convened for its October term. He filed his Motion for continuance on September 30, 1957, stating that he was confined in the Hospital and would be incapacitated for a period of at least three weeks and could not appear at this term of Court. (R. 23).

3. There was no competent, concrete evidence that Petitioner had made any effort, of any kind, to influence any member of the Jury. (R. 29).

The Prosecuting Attorney's Motion to remand the Petitioner for jail was submitted to the Court at the same time that Petitioner's Motion to disqualify the Trial Judge was submitted.

The only evidence offered on the State's Motion to Remand was that given by Sheriff C. T. Sullivan, (R. 43), and State Trooper Whelen Spears, (R. 50-51). Sheriff Sullivan's testimony did not reflect anything adverse to this Petitioner. He said he had heard some talk going around about an attempt to fix the Jury but he didn't know any particulars about it. (R. 44).

Sheriff Sullivan further stated that he did not, at any time, know of Petitioner's trying to avoid being in Court on March 3, 1958. (R. 43).

State Trooper Whelen Spears' testimony was based entirely upon his assumption, or his "impression". He said he got the "impression" Petitioner was talking about contacting a juror, (R. 51), and he "gathered" Petitioner was thinking about contacting one or more jurors. (R. 51).

State Trooper Spears further stated that he did not gather from the conversation that Petitioner was going to jump bail. (R. 51).

The Trooper's testimony was based upon a conversation that he had with Petitioner when he met him in a restaurant on the day before the trial. They were both in the restaurant

on that day and the Trooper had the waitress call the Petitioner over to his table to talk to him. (R. 51). This was strange procedure on the part of the Trooper. It smacks of entrapment.

The above was all the testimony given in behalf of the State on its motion to take the Petitioner into custody. On this testimony, and on it alone, the Court remanded Petitioner into custody and fixed his bond at $20,000.00. In doing so, the Court said it had been informed by the Sheriff of the substance of Whelen Spears' testimony, and in the light of that information was remanding Petitioner into custody. (R. 53).

A $20,000.00 Bond is usually considered sufficient in a homicide case, much less a burglary and grand larceny case.

The only evidence submitted on the Motion to disqualify the Judge was the evidence of the Petitioner himself.

He stated that he made the Bond ordered in the amount of $12,500.00; was released on the Bond; was present in the Court Room on March 3, 1958 when his cause was called for trial; had made no attempt to withdraw from the County or the presence of the Court and it had been, and was, his intentions to proceed with trial, and the Judge's actions in remanding him into custody without notice led him to believe that it would have an influence on the Jury to his disadvantage. (R. 35-37).

Petitioner's Motion to Disqualify the Trial Judge was denied at the same time that he was remanded into custody and his Bond increased.

The above is just the beginning of the bias and prejudice shown by the Circuit Judge of Poinsett County, Arkansas, and his actions, up to this point, clearly show that Petitioner was deprived of the right of trial by an impartial jury, as guaranteed by Amendment 8 to the Constitution of the United States, and Article 2, Section 9 of the Constitution of the State of Arkansas.

When the Jury returned a verdict of Guilty against the Petitioner in this case and left his punishment to be fixed by the Court, the Court was as much bound by the provisions of both the Constitution of the United States and the Constitution of the State of Arkansas with reference to "trial by impartial jury" as is the jury itself. The admonition of "impartial trial" is as binding upon the Trial Judge as it is upon the jury itself, and if either show partiality, or bias or prejudice, the Defendant has not received a "trial by an impartial jury".

33 Corpus Juris, Subject "Judges", Section 128, Page 938, expresses the duty of the Judge in the following manner:

> "Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge. The immediate rights of the litigants are not the only object of the rule, but public policy demands its observance. * * *"

II.

Throughout the trial of this case the Judge of the Circuit Court showed his unusual interest and his bias against the Defendants by taking over the witness from the defense attorney and prosecuting attorney and interrogating them at length.

The actions of the Judge in remanding Petitioner into custody, when he was present in Court ready for trial, and under Bond; raising Petitioner's Bond from $12,500.00 to $20,000.00 and the unusual interest in the case shown by the Judge throughout the trial, certainly had its effect on the jury, else, why would they leave the punishment of the Petitioner up to the Court when rendering their verdict? (R. 30).

The Supreme Court of Arkansas reversed a conviction for homicide because of the attitude and remarks of the Trial Judge in the late case of *McMillan v. State*, Arkansas Law Reporter of June 23, 1958, 314 S. W. 2d 483, with the following observation:

> "* * *. It must be remembered that many jurors are serving for their first time, but, for that matter, even though they have served numerous times, the attitude, statements, and opinions of the Court probably make a more indelible impression upon the mind of the juror than any other factor during a trial. To the jury, his word is the law. As stated by the late Justice Butler in *Western Coal and Mining Company v. Krane*, 193 Ark. 426, 100 S. W. 2d 676:

"'Because of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or what might tend to influence the minds of a jury. By his words or conduct he may, on the one hand, support the character and weight of the testimony, or may destroy it in the estimation of the jury. Because of his personal and official influence, uncalled for or impatient remarks, although so not intended by him, may give one of the parties an unfair advantage over the other.

"* * *

"'In the midst of doubt as to what their verdict should be as to appellant, it was natural for them to seize upon and adopt any opinion which they understood the judge to have expressed or intimated upon the question they were required to decide. * * *'"

In fixing Petitioner's punishment, the Circuit Judge, in his remarks made as shown in the statement, said:

"* * *. The Court has been furnished with criminal records of these defendants * * *" (R. 167).

There were two previous convictions shown against Petitioner and the Arkansas Habitual Criminal Statute (Section 43-2328, Arkansas Statutes) provides that upon

a third offense the defendant shall be sentenced to imprisonment for a determinate term of not less than two years more than the minimum sentence provided by law for a first conviction.

The Circuit Judge took the two former convictions of Petitioner into consideration in assessing his punishment but the record reveals, without question, that he was more influenced by the fact that, through rumors and hearsay alone, he was convinced that Petitioner was "not just ordinary criminals like some individuals who just happen to be caught in the web of circumstances, but that you are professionals and members of a gang, an organized gang. * * *" (R. 168).

The Court further stated, in assessing punishment against Petitioner, that if any other members of his gang want to operate in the State of Arkansas they can do so at their peril." (R. 168).

The record is totally void of any evidence, of any kind or nature, that Petitioner is a member of a gang, organized or otherwise, to substantiate the above conclusions of the Court.

There are numerous instances in which the Arkansas Supreme Court has reduced punishment, and one of the foremost cases is that of *Hadley v. State*, 196 Ark. 307, 117 S. W. 2d 352, wherein one Hadley was convicted in the Lower Court of the crime of false pretense and sentenced to serve twenty-one years in the penitentiary. In reducing the sentence from twenty-one to two years, the Arkansas Court said:

"On cross-examination appellant was interrogated about former felony convictions. He admitted he was convicted in Texas in 1925 as Bob Morell and sentenced to serve two years but was soon pardoned; that he was sentenced to serve five years in Oklahoma as W. W. Craig for making a defendant's bond and 'giving the judge a check for it . . . I had money in the bank but not enough to cover it'; that in 1929 he was sentenced to serve three years in the Federal Prison at Leavenworth, Kansas, 'for using a government office for my own profit,' and served nearly thirty-three months; also, that he went to the penitentiary in Oklahoma in 1927 as W. W. Craig, and served twenty-seven months — in all, four sentences. Again, at Laredo, Texas by agreement, he accepted a two year sentence for issuing a 'cold' check."

"* * * *"

"In view of appellant's admitted checkered career and his aptitude for issuing worthless checks, the jury doubtless felt that it was time to curtail the errors which so frequently became an instant to the appellant's roving habits. But while the impulse which gave rise to the jury's actions may be understood in the light of appellant's leaning toward crime, such considerations can not be permitted to convert the court's processes into an agency of vengefulness. Even if the law of this state does fix twenty-one years as a maximum penalty for larceny, it was not the intention of the lawmaking body that such maximum should

be invoked except as punishment for reprehensible conduct in aggravation of the particular act. Cruel and unusual punishment are prohibited by our constitution. It may well be said that if punishment has been fixed for a stated crime, and such legislative act is not declared unconstitutional, no sentence imposed thereunder can be regarded as cruel or unusual. The logic and applicability of such argument will be readily conceded.

"Although objection was not made to the questions particularizing with respect to collateral matters incident to the felonies of which appellant has been formerly convicted, and for which he had served time, it is clear that such questions served to inflame the minds of jurors. Otherwise a sentence of twenty-one years would not have been imposed.

"• • •"

"In the instant case we hold that the excessive verdict clearly shows passion and prejudice resulting from the collateral discussion of former crimes. The judgment will, therefore, be modified by reducing the punishment to two years in the penitentiary, and, as so modified, said judgment is affirmed."

In the instant case there are only two former convictions shown against Petitioner. (Ex. 15, R. 181 and Ex. 16, R. 182). There was no reprehensible conduct in aggravation of the circumstances shown — such as an assault committed

at the time of the burglary; a use of firearms and resistance to arrest, or in any other manner, or threats or use of violence against anyone.

The total values of the property stolen, according to the Information were $1,793.20. All of this property was recovered and returned to the owner.

In Arkansas a prisoner is eligible for parole after serving one-third of his sentence. Had the Lower Court fixed Petitioner's punishment in each charge at the maximum of twenty-one years, to run concurrently, Petitioner would have been eligible for parole in seven years.

As it is, he is not eligible for parole until he has served his full ten years on the burglary charge and three and one-third years on the larceny charge, or a total of thirteen and one-third years.

This is equivalent to a sentence of thirty-nine years in the penitentiary. On a thirty-nine year sentence, Petitioner would be eligible for parole in thirteen years.

In the *Hadley v. State* case, *supra*, our Court, in Arkansas, has taken the view that such maximum punishment should not be invoked except by reprehensible conduct in aggravation of the particular act.

Since there is a complete absence of aggravated circumstances in the instant case, what then, prompted the Lower Court to assess such cruel and excessive punishment?

The record itself answers the question. It was nothing less than bias and prejudice on the part of the Court, the

result of rumors and gossip which reached the Court's ears from unknown and unrevealed sources and which are not a part of the record or revealed by any witness or evidence introduced in the case.

In the case of *Davis v. State*, 155 Ark. 245, 244 S. W. 750, this Court reduced the sentence of death in a rape case, in which a fifteen year old girl was the victim, to life imprisonment; in the case of *Darden v. State*, 73 Ark. 315, 84 S. W. 507, a conviction of murder in the first degree was reduced to voluntary manslaughter, and in the case of *Vance v. State*, 70 Ark. 272, 68 S. W. 37, a conviction of murder in the first degree was reduced to murder in the second degree.

All of these crimes are much more odious than the crime committed by Petitioner.

The Circuit Court of Appeals in speaking of cruel and excessive punishment in the late case of *Kasper v. Brittain, et al*, 245 F. 2d 92, on page 96 of the opinion said:

> "The contention that the sentence imposed upon appellant was excessive is likewise rejected. Punishment is not 'cruel and unusual' unless it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice. Weems v. United States, 217 U. S. 349, 30 S. Ct. 544, 54 L. Ed. 793; United States v. Rosenberg, 2 Cir. 195 F. 2d 583, Certiorari denied, 344 U. S. 838, 73 S. Ct. 20, 97 L. Ed. 687.
>
> That is not the case here."

In the cases in the State Courts different views of the provision are taken. Some of these views are discussed in

Weems v. United States, supra, which is cited in the case of *Kasper v. Brittain, supra.* But whatever the views, it can hardly be said that the term of punishment assessed by a court, based solely upon rumors and hearsay from which bias and prejudice has emanated, can be termed anything but unusual.

No matter what the length of the term of the punishment, when based upon bias and prejudice, conceived in rumors and hearsay, it is nothing less than "completely arbitrary and shocking to the senses of justice."

CONCLUSION

Petitioner has been deprived of a fair and impartial trial (raised in his Motion to Disqualify the Trial Judge) and inflicted with cruel and unusual punishment (raised in his Petition for Re-Hearing before the Supreme Court of Arkansas) in violation of Amendment 6 and 8 of the Constitution of the United States, Article 2, Section 10 and Article 2, Section 9 of the Constitution of the State of Arkansas.

For these reasons the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF ARKANSAS

REAVES V. STATE OF ARKANSAS

4916

Opinion delivered October 6, 1958

Appeal from Poinsett Circuit Court, Criminal Division; H. G. Partlow, Circuit Judge; affirmed.

MINOR W. MILLWEE, Associate Justice.

The appellants, James George Reaves and Lonnie Neal, were jointly charged, tried and convicted of burglary and grand larceny by breaking into the Ben Powell Chevrolet Company at Trumann, Arkansas, and stealing certain property valued at more than $1,000.00. The amended information also charged prior felony convictions of both appellants. In their verdict the jury left the punishment to the trial court. Reaves was sentenced to ten years for burglary and ten years for grand larceny, the sentences to run consecutively. Neal was given similar sentences of ten years for burglary and five years for grand larceny.

We first consider the sufficiency of the evidence to support the verdict. Sherman Coppell operates and lives in the rear of a restaurant located next to, and in the same building occupied by, the Ben Powell Chevrolet Company at Trumann, Arkansas. Coppell testified that he and his son-in-law, Harry Eubanks, were occupying these living quarters on the night of April 21, 1957. About four o'clock the next morning they heard hammering noises in the office of the automobile company and observed a car backed up to the front of the building. When the telephone operator did not respond to his call in an effort to notify the police,

Coppell threw a tub out the rear door of his restaurant toward the place where the office safe of the automobile company was located. He wrote down the Illinois license number of the car as Eubanks read it and saw two or three men leave the auto company store in the Ford automobile after putting some object in it.

The owner of the automobile company was notified and found his safe had been broken into and $980.00 in checks, money orders and cash missing in addition to an adding machine worth $50.00 and a 35-horsepower outboard motor and fuel tank. In response to radio alarms, several officers in three automobiles pursued and overtook the Ford automobile in which the appellants and a codefendant, George F. Garner, were riding. The missing adding machine, outboard motor and fuel tank were in the rear trunk of the car, and the checks and money orders were scattered along the route. Three loaded pistols, a glove and a 1957 Alabama automobile license plate were also found in the car. Reaves admitted ownership of the car to arresting officers and had $1048.96 in his possession and Neal had $48.46 on his person. Both parties had previously been convicted of felonies as charged in the information.

Appellants declined to offer any testimony in contradiction to that adduced by the state. When considered in the light most favorable to the state, this testimony was sufficient to sustain the verdict. Aside from the evidence directly connecting appellants with the burglary and larceny, we have frequently held that the possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a verdict of either larceny or receiving stolen property. *Sons v. State*, 116 Ark. 357, 172 S. W. 1029; *Shoop v. State*, 209 Ark. 498, 190 S. W. 2d 988.

Appellants next contend that the court erred in the admission of certain testimony regarding the ownership and identification of the adding machine and outboard motor recovered from the car occupied by appellants at the time of their arrest. T. M. Hunn, manager of the Ben Powell Chevrolet Company, testified that he compared the serial number of the adding machine recovered from appellants' car with that taken from a list of company property kept in his office in the usual course of business and that the two numbers were identical. Another witness gave similar testimony with reference to the serial number of the outboard motor. Appellants now argue that this testimony was inadmissible as hearsay evidence under our holding in *Jackson v. State*, 226 Ark. 731, 293 S. W. 2d 699. In that case we held that the rule excluding hearsay testimony extends to written as well as oral statements, and that evidence otherwise incompetent as hearsay is not admissible merely because it is written or printed. The only objection made by appellant to the testimony at the trial was that the witness himself did not actually make the list or record and, hence, was not in position to know whether it was correct or not. It should be noted that neither the serial number nor the list of either item was ever offered in evidence. If it had been, the State would perhaps be correct in its contention that it would have been admissible under our statute (Ark. Stats. Sec. 28-928). The statement by the witnesses that they compared the two serial numbers was one of fact and not merely hearsay, although it might have been shown to be based on hearsay by further development of the evidence or cross-examination of the witness. Since this was not done and since the objection now argued was not made at the trial, it may not be raised for the first time on appeal.

It is next contended that it was error to admit testimony regarding the finding of the three pistols and other articles in the car used and occupied by the appellants without a search warrant. We have repeatedly held such evidence by arresting officers admissible in the absence of a search warrant. *Knight v. State*, 171 Ark. 882, 286 S. W. 1013; *Garner v. State*, 184 Ark. 1093, 44 S. W. 2d 1092. See also, *Banks v. State*, 207 Ala. 179, 93 So. 293, Cert. Denied 260 U. S. 736, 67 L. Ed. 488, 43 S. Ct. 36.

Appellants also objected to the introduction of photographs of the automobile company office and safe and the articles found in the automobile. These photographs, which were taken shortly after the burglary, were shown to be true and accurate pictures of the articles and place mentioned by those in a position to know. The admission and relevancy of such matters rests largely in the discretion of the trial court. We cannot say this discretion was abused, and conclude that the photographs enabled the witnesses better to describe, and the jury better to understand, the testimony. See *Oliver v. State*, 225 Ark. 809, 286 S. W. 2d 17.

Appellant Reaves urges error in the denial of his motion to disqualify the trial judge on account of alleged bias and prejudice against said defendant. The court directed that Reaves, who was on bail, be taken into custody during the trial when it was brought to the court's attention that he had indicated that he might attempt to fix or tamper with the petit jury. Ark. Constitution, Art. VII, Sec. 20, provides: "No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law;

or in which he may have been of counsel or have presided in any inferior court." Ark. Stats., Sec. 22-113, fixes the fourth degree of consanguinity or affinity as that "prescribed by law" under this provision of the Constitution. As this court pointed out in *Jones v. State*, 61 Ark. 88, 32 S. W. 81: "There is no provision of our constitution or statutes that disqualifies a judge for prejudice. If having formed an opinion as to the guilt or innocence of a defendant on trial in a criminal case was a disqualification of a judge presiding at the trial, it would often be a difficult matter to find a judge that would not be disqualified."

Whether a defendant remain on bail or be kept in actual custody during his trial for a felony is a matter within the sound discretion of the trial judge under our statutes (Ark. Stats., Secs. 43-710 and 43-2103). We find no abuse of that discretion here, and none of the matters mentioned in the constitutional provision and statute as disqualifying a judge to preside were shown.

Appellant Reaves also argues that the punishment is unreasonable and excessive, but the motion for new trial contains no assignment of error on this ground. Besides, it was within the peculiar province of the trial court to assess the punishment. This was done well within the limits fixed by statute and, under the testimony presented, we do not feel warranted in substituting our judgment for that of the trial court. See *Cox v. State* 164 Ark. 126, 261 S. W. 363; *Garner v. State, supra; McHenry v. State*, 219 Ark. 401, 242 S. W. 2d 707.

The judgment is affirmed.

Robinson, J., concurs.

IN THE SUPREME COURT OF AKANSAS

MAY TERM 1958 .OCTOBER 6, 1958

JAMES GEORGE REAVES — APPELLANT

vs. Appeal from Poinsett Circuit Court

THE STATE OF ARKANSAS — APPELLEE

JUDGMENT

This cause came on to be heard upon the transcript of the record of the circuit court of Poinsett County, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs, and that unless appellant shall forthwith surrender himself to the Supreme Court in execution of said judgment, his bond be declared as forfeited.

It is further considered that said appellee recover of said appellant all her costs in this Court, in this cause expended, and have execution thereof. ROBINSON, J., concurs.

IN THE SUPREME COURT OF ARKANSAS

JAMES GEORGE REAVES — APPELLANT

Vs. Criminal No. 4916

STATE OF ARKANSAS — APPELLEE

APPEAL FROM POINSETT COUNTY CIRCUIT COURT

Honorable H. G. Partlow, Judge

APPELLANT'S PETITION AND BRIEF FOR RE-HEARING

Appellant, for his Petition, states:

1. The Court erred in refusing to decrease the punishment assessed against Appellant on the ground that no assignment of error on this ground was reserved in the motion for new trial.

2. The Court erred in ignoring the flagrant violation of Appellant's rights under Sections 9 and 10, Article 2 of the Constitution of the State of Arkansas and under Amendments 7 and 8 of the Constitution of the United States.

WHEREFORE, Appellant, James George Reaves, prays that a rehearing be granted him in this cause.

SAM ANDERSON

HOLT, PARK & HOLT

Attorneys for Appellant

CERTIFICATE

STATE OF ARKANSAS)

ss.

COUNTY OF PULASKI)

I, JOHN F. PARK, one of the attorneys for Appellant, James George Reaves, an oath state:

I verily believe there is merit in the foregoing Petition and it is not filed for the purpose of delay.

WITNESS my hand this 17th day of October, 1958.

John F. Park

Subscribed and sworn to before me this 17th day of October, 1958.

Dora Mae Anderson
Notary Public

My Commission expires:
August 11, 1960

(SEAL)

ENDORSED FILED OCTOBER 20, 1958
C. R. STEVENSON, CLERK

IN THE SUPREME COURT OF ARKANSAS

MAY TERM 1958 NOVEMBER 10, 1958

JAMES GEORGE REAVES APPELLANT

vs.

THE STATE OF ARKANSAS APPELLEE

ORDER OF RE-HEARING

The Petition for rehearing was Denied.

November 10, 1958

JACK HOLT

JACK HOLT JR.

115 North State Street

Little Rock, Arkansas

Attorneys for Petitioner